

TEACH YOUR CHILDREN WELL: HISTORICAL MEMORY OF THE CIVIL WAR AND RECONSTRUCTION, PUBLIC EDUCATION, AND EQUAL PROTECTION

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INTRODUCTION

“Education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free.”

—Frederick Douglass¹

In October 2015, a Houston mother named Roni Dean-Burren posted a video about her son’s McGraw-Hill textbook on her Facebook page. It went viral.² In it, she points out that her son attends a public school in Texas and flips through his high school geography book, showing viewers that the Texas Education Advisory Board approved its use in Texas schools.³ Turning to a chapter of the book entitled “Patterns of Immigration” she reads aloud, “The Atlantic Slave trade between the 1500s and the 1800s brought millions of workers from Africa to the southern United States to work on agricultural plantations . . . Erasure is real, y’all.”⁴ Ms. Dean-Burren, her son, and thousands of other people—nationally and internationally—wondered how such content ended up in a Social Studies textbook in use in a public-school classroom.⁵ The publisher, it turns out,

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¹ Frederick Douglass, *The Blessings of Liberty and Education* (Sept. 3, 1894) in 5 *THE FREDERICK DOUGLASS PAPERS* 616, 623 (John W. Blassingame & John R. McKivigan eds. 1992).

² Roni Dean-Burren, FACEBOOK (Oct. 1, 2015, 8:44 AM), <https://www.facebook.com/roni.deanburren/videos/vb.1423354683/10208248919206996/> (receiving, as of February 2020, over 2.1 million views).

³ *Id.*

⁴ *Id.*

⁵ See, e.g., Tom Dart, *Textbook Passage Referring to Slaves as ‘Workers’ Prompts Outcry*, *GUARDIAN* (Oct. 5, 2015), <https://www.theguardian.com/education/2015/oct/05/mcgraw-hill-textbook-slaves-workers-texas> (explaining that, as a result of Dean-Burren’s post and the ensuing reaction on social

had likely written the textbook to comply with the curricular standards set by the democratically elected Texas State Board of Education (“SBOE”).⁶

This process, critics fear, has far-reaching implications for students all over the United States.⁷ With longstanding statewide adoption standards, Texas represents the largest single purchaser of K–12 textbooks in the country.⁸ Resultantly, textbook publishers cater new editions of textbooks to the Texas Essential Knowledge and Skills (“TEKS”) standards.⁹ A state flexing its muscle to encourage publishers to write textbooks that comport with a particular ideology is not a new phenomenon and has been a feature of America’s federalist education system since Reconstruction. The principal question this Comment seeks to explore is the extent to which courts should seek to intervene in this highly politicized space: where does the line between permissible government speech end and equal protection in the education context begin? This Comment posits that teaching history, now understood to be inaccurate and ahistorical, that has a discriminatory impact on a protected class and fails to prepare all students for the rigors of citizenship is incompatible with the Fourteenth Amendment. The history curriculum promulgated by the Texas SBOE does not comport with modern, accepted historiography. To demonstrate this, this Comment first explores the historiographical origin and evolution of the study of the Civil War and Reconstruction Era, identifying issues with placing stock in early accounts of historical events because they were motivated by racism and a desire to return to a pre-Civil War society. Ultimately, the prevailing story of the Civil War and Reconstruction that emerged ignored or severely downplayed the central role that slavery played in the conflict, and it wrongly assigned blame

media objecting “to a choice of words which seems to imply that slaves were economic migrants,” McGraw-Hill announced that it would “change the wording in future editions.”).

⁶ *Id.* (noting that, in 2010, “Christian conservatives on the Texas board of education approved a curriculum that they saw as redressing liberal biases” and suggested that the Atlantic slave trade be renamed the “Atlantic triangular trade.”).

⁷ See Annabelle Timsit & Annalisa Merelli, *For 10 Years, Students in Texas Have Used a History Textbook That Says Not All Slaves Were Unhappy*, QUARTZ (May 11, 2018), <https://qz.com/1273998/for-10-years-students-from-texas-have-been-using-a-history-textbook-that-says-not-all-slaves-were-unhappy/>; Gail Collins, *How Texas Inflicts Bad Textbooks on Us*, N.Y. REV. BOOKS (June 21, 2012), <https://www.nybooks.com/articles/2012/06/21/how-texas-inflicts-bad-textbooks-on-us/> (noting that as a result of Texas’s purchasing power, publishers tend to gear textbook content towards Texas’s “confusing demands and conflicting requests,” thus leaving students and teachers “all around the country . . . to make their way through murky generalities” and “unreadable mush.”).

⁸ Although California has a larger student population than Texas, it does not have statewide adoption standards after middle school.

⁹ See Collins *supra* note 7 (“No matter where you live, if your children go to public schools, the textbooks they use were very possibly written under Texas influence.”).

for the perceived failures of Reconstruction on the enfranchisement and participation of freedmen. Second, this Comment examines the pervasive influence of this historiography on modern classrooms. Finally, this Comment summarizes the political and constitutional issues attendant in Texas's curriculum-adoption and textbook-approval processes. With an eye toward legal solutions, curriculum adoption is placed in the broader context of government speech, discrimination, and a more expansive understanding of the ability of litigants to challenge government speech under the Equal Protection Clause.

I. THE CIVIL WAR, RACE, AND PUBLIC MEMORY IN EDUCATION

A. *Reconstruction and Reimagining the Civil War in the Fight for Public Memory*

Debates in American consciousness over commemorating the Civil War and understanding its causes started while Reconstruction was still underway. This struggle over the meaning of the Civil War was almost inevitable, as the ideology underpinning the War in public memory would provide a justification for either rapid reunification or a clean break with the past premised on social and political revolution.¹⁰ Political turmoil in the Federal Government reflected these debates.¹¹ Some Members of Congress, alongside President Johnson, sought rapid reconciliation for former Confederates, while others believed that treating the states of the Confederacy as conquered provinces was the best course forward to ensure that the Reconstruction Amendments would be enforced.¹² Some

¹⁰ As early as 1877, Frederick Douglass pointed out:

Good, wise, and generous men at the North . . . would have us forget and forgive, strew flowers alike and lovingly, on rebel and on loyal graves. This sentiment is noble and generous, . . . but . . . [t]here was a right side and a wrong side in the late war, which no sentiment ought to cause us to forget, and while today we should have malice toward none, and charity toward all, it is no part of our duty to confound right with wrong, or loyalty with treason.

Frederick Douglass, Speech delivered in New York, New York, Decoration Day (1877), *available at* <https://www.loc.gov/resource/mfd.23011/?sp=10>.

¹¹ For instance, Andrew Johnson first steered Reconstruction rather unsuccessfully and made enemies of the radical Republicans in Congress. Ultimately, Johnson was impeached by Congress in 1868. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 334 (2d ed. 2014) (discussing Johnson's impeachment).

¹² See Thaddeus Stevens, Address on Reconstruction (Sept. 7, 1865), *reprinted in* LIBRARY CONG. ARCHIVES 3 (Examiner & Herald Print 1865) ("But reformation *must* be effected; the foundation of their institutions, both political, municipal and social *must* be broken up and *relaid*, or all our blood

questioned the trustworthiness of the secessionists, and others still believed the humiliation of defeat was evidence of their contrition.¹³ Questions about, among other things, local infrastructure, property rights, and debt relief abounded.¹⁴ During the years of Reconstruction, the meaning of the Civil War developed into rallying cries for various political factions, with both Republicans and Democrats scrambling to ensure that the meaning they attached to the War would prevail.¹⁵ Republicans believed that whichever meaning attached in American consciousness would help to shape what the United States looked like politically and socially.¹⁶

Simultaneously, former Confederate leaders sought to regain political power and to wrest the retelling of the Civil War and Reconstruction away from Republicans and into their own hands. In some ways, Confederate veterans and neo-Confederates won the war for the memory and the

and treasure have been spent in vain. This can only be done by treating and holding them as a conquered people.”).

¹³ See DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 40 (2001).

¹⁴ ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION* 162–63 (1st ed. 2014) (noting that “[m]ore than any other, the issue of economic development preoccupied Republican leaders in the first years of Reconstruction . . . [and] every Southern state extended generous aid to railroad corporations” in an effort to “bring capitalist development to the South.”).

¹⁵ As David Blight elucidates in *Race and Reunion*, politicians of all stripes employed “bloody shirt” rhetoric to compel others to adopt their positions on Reconstruction policy, particularly as it related to the pace of reunification with Southern States. Thaddeus Stevens was a particularly colorful rhetorician from the North. “Do not, I pray you, admit those who have slaughtered a million of our countrymen until their clothes are dried, and until they are reclad. I do not wish to sit side by side with men whose garments smell of the blood of my kindred.” CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866) (statement of Rep. Stevens) reproduced in BLIGHT, *supra* note 13, at 51. But Southerners also called upon the carnage of the war to generate sympathy; William E. Finck, a Democrat who held a “favored image of the South,” stated, “[o]nly rapid and ‘complete restoration . . . c[ould] assuage the oceans of blood and treasure’ Americans had ‘poured out like water.’” CONG. GLOBE, 39th Cong., 1st Sess. 2464 (1866) (statement of Rep. Finck) reproduced in BLIGHT, *supra* note 13, at 52.

¹⁶ After Johnson’s impeachment, Republicans had reason to believe they were continuing to gain ground: strong national policies and Republican politicians enjoyed success through 1868. For instance, a condition of reunification was premised on southern acceptance of the Fourteenth Amendment; along with ratifying it, every southern state drafted its constitution to include a right to public education. Critically, after the Fourteenth Amendment was ratified, Congress conditioned readmission to the Union for Texas on providing equal education to all citizens. Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (providing that Texas would be admitted to the Union so long as its constitution “shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the [state] constitution”); see also FONER, *supra* note 14, at 138 (showing that the constitutional conventions of 1867–69 reflected the importance that Republicans, and especially black southerners, placed on education.)

historical imaginings of the Civil War, even as they lost on the battlefield.¹⁷ In direct contrast to many of the Secessionist Constitutions,¹⁸ former Confederates like Jefferson Davis claimed that slavery was not the cause of the Civil War, but rather, Yankee and federal incursions into state sovereignty were.¹⁹ This idea, of course, was a *justification* for secession, but it did not exist in a vacuum and was premised on the need to protect property rights in enslaved humans. By the 1880s, a sentimental, highly moralistic²⁰

¹⁷ BLIGHT, *supra* note 13, at 102 (“Mingling honor, state rights, and racism, Southern Democrats initiated the arguments . . . that eventually led to the ‘redemption’ of their states in the 1870s.”); see also Jack P. Maddex Jr., *Pollard’s The Lost Cause Regained: A Mask for Southern Accommodation*, 40 J. S. HIST. 595, 599 (1974) (summarizing journalist Edward Pollard’s attempts to reframe the Southern Cause as white supremacy divorced of slavery and “to build a southern cultural consciousness on the memory of the Confederate struggle, and to await future opportunities.”).

¹⁸ See, e.g., AN ADDRESS SETTING FORTH THE DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF MISSISSIPPI FROM THE FEDERAL UNION AND THE ORDINANCE OF SECESSION (1861) (“Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world.”); DECLARATION OF THE CAUSES WHICH IMPEL THE STATE OF TEXAS TO SECEDE FROM THE FEDERAL UNION paras. 3–4 (Feb. 1, 1861) (“[Texas] was received as a commonwealth holding, maintaining and protecting the institution known as negro slavery—the servitude of the African to the white race within her limits—a relation that had existed from the first settlement of her wilderness [sic] by the white race, and which her people intended should continue to exist in all future time . . . [b]ut . . . [t]he controlling majority of the Federal Government, under various pretences [sic] and disguises, has so administered the same as to exclude citizens of the Southern States, unless under odious and unconstitutional restrictions, from all the immense territory owned in common by all the States, on the Pacific ocean, for the avowed purpose of acquiring sufficient power in the common government, to use it as a means of destroying the institutions of Texas and her sister slaveholding States.”); COMMITTEE OF SEVENTEEN, GA. SECESSION CONVENTION, REPORT ON THE ORDINANCE OF SECESSION, *reprinted in* 1 THE CONFEDERATE RECORDS OF THE STATE OF GEORGIA, JOURNAL OF SECESSION CONVENTION 212, 349–50 (Allen D. Candler ed., Atlanta, State Printer 1909) (“For the last ten years we have had numerous and serious causes of complaint against our non-slaveholding confederate States, with reference to the subject of African slavery. They have endeavored to weaken our security, to disturb our domestic peace and tranquility, and persistently refused to comply with their express constitutional obligations to us in reference to that property, and by the use of their power in the Federal Government, have striven to deprive us of an equal enjoyment of the common Territories of the Republic. This hostile policy of our confederates has been pursued with every circumstance of aggravation which could arouse the passions and excite the hatred of our people, and has placed the two sections of the Union, for many years past, in the condition of virtual civil war.”).

¹⁹ See, e.g., Jefferson Davis, Speech at Richmond (Nov. 3, 1870) in 12 THE PAPERS OF JEFFERSON DAVIS 502, 505 (Lynda Lasswell Crist ed., 2008) (memorializing Robert E. Lee: “[h]e was ready to go anywhere, on any service for the good of his country, and his heart was as broad as the fifteen States struggling for the principles that our forefathers fought for in the Revolution of 1776.”) (emphasis in original).

²⁰ See, e.g., Peter S. Carmichael, Essay, “*Truth is Mighty & Will Eventually Prevail*”: Political Correctness, Neo-Confederates, and Robert E. Lee, S. CULTURES 6, 7 (2011) (arguing that Victorian attitudes

image of the Civil War and even the Antebellum South had emerged in American culture.²¹

This reimagining of the Civil War found its way into the annals of public memory and the academy, lending a sense of intellectual legitimacy that would influence generations. Southern historians and leaders established institutions like the Southern Historical Society (“SHS”); comprised of many Confederate veterans, the SHS sought to record and disseminate the so-called “true” history of the War and its causes.²² Writing in the immediate shadow of the Compromise of 1877, SHS historians argued that Reconstruction governments were illegitimate.²³ By extension, detractors viewed the Reconstruction Amendments as unjustified because they had been coerced.²⁴ As these works gained prevalence, radical republicanism waned, and congressional animosity toward the Confederacy and slavery were eclipsed by other federal concerns.²⁵ Erasure, it seemed, was critical to reconciliation.

It is deeply ironic that out of one of Reconstruction’s greatest triumphs, the widespread establishment of public, state-run schools and great advances in literacy for Black students and white students alike, gave southern

prevalent among Confederate veterans led to a desire to order the world and history in a highly moralistic way).

²¹ At the commemoration opening of the Confederate White House, former Confederate general Bradley T. Johnson described slavery as “the apprenticeship by which savage races had been educated and trained into civilization by their superiors.” Further, his speech referred to George Washington as the first “rebel president,” complicating Confederate Secessionist’s relationship to the United States. In some ways, the Confederacy was truer to the original constitution, insofar as it promoted slavery. On the other hand, secession made the Confederacy the literal repudiation of the United States. BLIGHT, *supra* note 13, at 256–57.

²² See R.M.T. Hunter, *Origin of the Late War*, in 1 S. HIST. SOC’Y PAPERS, JAN. TO JUNE, 1876, at 1, 5 (J. William Jones ed.) (arguing that the Civil War was caused by a breach of the compact between the states and that [southerners] “united in the common cause and determined to [sacrifice] . . . all that was dear to them on the altars of war sooner than submit without resentment to the loss of liberty, honor and property by a cruel abuse of power and a breach of plighted faith on the part of those who had professed to enter with them into a union of justice and fraternal affection.”).

²³ See B.J. Sage, *Some Great Constitutional Questions*, 12 S. HIST. SOC’Y PAPERS, JAN. TO DEC., 1884, at 485, 492 (J. William Jones ed.) (arguing that the Reconstruction process represented a usurpation of power by the Federal Government and that secession was not treason).

²⁴ *Id.*

²⁵ See WHITELAW REID, NEW YORK TRIBUNE (1875), reprinted in BLIGHT, *supra* note 13, at 129–31 (explaining the change in the Republican party’s shift away from emphasizing Reconstruction enforcement and toward economic recovery in the early 1870s. This coupled with a focus on commemorating Confederate and Union soldiers to quell labor unrest contributed to a feeling that “time [was] softening the asperities growing out of a long civil war.”).

historians a vehicle through which to disseminate this new historiography.²⁶ Congressional Republicans and the framers of southern state constitutions believed increased racial equity and democratic participation could be disseminated through widely accessible public schooling.²⁷ Rejoining the Union was thus partly conditioned on states granting education access.²⁸ Texas was required, along with several other states, to establish a permanent education fund, and other southern states voluntarily included such funds in their constitutions, fueled by the new political power of freedmen.²⁹

However, the same historians, politicians, and Confederate leaders who resisted congressional Reconstruction viewed public education as a way to solidify their ideological account of the Civil War for subsequent generations.³⁰ A Confederate-sympathetic history, it seemed, belonged in southern public schools and would find its way into schools outside of the South as well. This was due in part to the booming textbook market, which was largely dominated by a consolidated group of northern publishers.³¹ The fact that the majority of southern states adopted statewide education standards in the late nineteenth and early twentieth century meant that they were able to exert far more power over the publishing industry than northern states, which tend even today to favor setting education standards on a highly localized, district-by-district basis.³² In addition, statewide adoption of textbooks ensured that a somewhat cohesive ideology was promoted across

²⁶ See JOSEPH MOREAU, *SCHOOL BOOK NATION: CONFLICTS OVER AMERICAN HISTORY TEXTBOOKS FROM THE CIVIL WAR TO THE PRESENT* 56–73 (2003) (arguing that a combination of the emergence of Lost Cause historiography, powerful neo-Confederate lobbying blocs in former Confederate states, and a disregard of Black education activists led to the widespread dissemination of this history in public schools).

²⁷ FONER, *supra* note 14, at 139 (showing that educational opportunities were a main concern of black southerners during the constitutional conventions).

²⁸ See Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 809 (2018) (highlighting the belief that “[m]anipulations in education . . . posed a fundamental threat to the republican forms of government Congress and the delegates to the state constitutional conventions were seeking to ensure.”).

²⁹ *Id.*

³⁰ Southern leaders sought to keep education a state-based institution, in part, fearing federal efforts to control education would lead to an integrated society. MOREAU, *supra* note 26, at 62. However, Republicans were successfully able to make education a statewide, rather than local, service in the former confederacy. This made it less vulnerable to discrimination and meant that the Reconstruction agencies could aid in its delivery. FONER, *supra* note 14, at 157.

³¹ MOREAU, *supra* note 26, at 69.

³² MOREAU, *supra* note 26, at 86.

school districts, notwithstanding variance in pedagogy.³³ By centralizing textbook adoption, rather than leaving it to individual cities and even schools, interest groups like the SHS and various Confederate veterans interest groups were able to focus their lobbying efforts in particular institutions.³⁴ Unfavorable depictions of slaveowners and Confederate soldiers—ranging from their valor on the battlefield to the pronouncement of slavery as the impetus for the Civil War—were wiped from textbooks.³⁵ Ultimately, publishers capitulated to the pressure of state adoption agencies, and by the 1920s, a vision of Reconstruction as an abject failure and an aberration emerged.³⁶ Publishers were willing to drastically alter complete manuscripts to please veterans groups, showing that a process “nominally controlled by educational experts [was] in practice remarkably responsive to well-organized lobbyists.”³⁷

By reimagining the Civil War as a war of valor and honor solely fought for states’ rights in the abstract, isolated from the subjugation and enslavement of millions, southern states were able to justify the violent dismantling of Reconstruction and re-establish antebellum racial stratification.³⁸ Even as Reconstruction played itself out, its detractors presented it as an unconstitutional incursion by the Federal Government, an invasion of scurrilous northerners into southern life, or incompetent chaos at the hands of freedmen who controlled Reconstruction governments.³⁹ This

³³ Notably, Edward Johnson recognized the marginalization, erasure, and outright racism that pervaded black narratives in textbooks. He wrote *A School History of the Negro Race in America* to combat the pernicious “sin of omission and commission on the part of white authors, most of whom seem to have written exclusively for white children, and studiously left out the many creditable deeds of the Negro.” EDWARD A. JOHNSON, *A SCHOOL HISTORY OF THE NEGRO RACE IN AMERICA* 3 (Edwards & Broughton, 1890), <https://docsouth.unc.edu/church/johnson/johnson.html>. Unfortunately, northern schools as well as southern schools were not integrated in the late nineteenth and early twentieth century, and resultantly, white schoolchildren in America read textbooks that presented white history. In addition, where southern states adopted statewide textbook standards, black schoolchildren either had to read the textbooks given to their schools or buy them themselves. See MOREAU, *supra* note 26, at 20.

³⁴ MOREAU, *supra* note 26, at 90.

³⁵ *Id.*

³⁶ One textbook even omitted the Thirteenth, Fourteenth, and Fifteenth Amendments from its reprinting of the U.S. Constitution. *Id.* at 79.

³⁷ *Id.* at 90.

³⁸ See generally FONER, *supra* note 14, at 238–55.

³⁹ See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding racial segregation as constitutional and finding that states could socially engineer segregation).

last criticism is now known to be blatantly false.⁴⁰ Further, charges of corruption in Reconstruction governments belied the fact that nearly every state government of the late nineteenth century was mired in some sort of scandal and was not a phenomenon exclusive to Reconstruction governments.⁴¹ Nonetheless, the pervasiveness of these misconceptions enabled a distorted view of Reconstruction to take shape.

B. Toward a More Integrated Historiography: Civil Rights Era Progress and Backlash

Even as white supremacist justifications for dismantling Reconstruction coalesced,⁴² a chorus of dissenters continued to question prevailing understandings of the era.⁴³ The Civil Rights Movement represented an opportunity for progressive legislators to call for reform and for activists to reform public education along a number of axes.⁴⁴ Nearly thirty years after W.E.B. DuBois wrote the seminal *Black Reconstruction*, Black civil rights activists in centers of power sought to elevate depictions of Black history in the classroom.⁴⁵ It was urgent work; the Dunning School and popular

⁴⁰ One of the great achievements of Reconstruction was that for the first time in America, governments—ranging from municipalities, to state houses, to the federal congress—were interracial. But freedmen never achieved full control of southern governments. See ERIC FONER, *FOREVER FREE* 160–61 (1963).

⁴¹ *Id.* at 168.

⁴² William A. Dunning was a professor of history at Columbia University. He, and members of his school, pioneered the use of primary source texts in studying the Reconstruction, but they relied exclusively on white accounts of Reconstruction. Their own “ingrained” racism shaped the ways in which they used primary source texts, but attitudes in the late nineteenth and early twentieth century meant that their positions were accepted without serious inquiry or criticism. See ERIC FONER, *RECONSTRUCTION* xx-xxi (2d ed. 2014); The Dunning School’s influence on popular American culture was widespread. See *BIRTH OF A NATION* (David W. Griffith Corp. 1915). But the combination of a highly influential school of historical meant these critics were largely ignored by the academy.

⁴³ See generally W.E. BURGHARDT DUBOIS, *BLACK RECONSTRUCTION IN AMERICA*, (2d ed. 1963) (dismantling racist narratives of the Reconstruction and problematizing the assumptions and worldviews of the widely accepted Dunning School).

⁴⁴ See generally KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION 1865–1877* (1965) (refuting historical analysis that glorified the Antebellum Era and the development of the South following the end of Reconstruction); Lerone Bennett Jr., *Black Power Part III: South Carolina: Post Bellum Paradise for Negroes*, *EBONY*, Jan. 1, 1966, at 116 (showing the achievements and challenges the Reconstruction legislature faced in South Carolina, with a reliance on both black and white primary accounts).

⁴⁵ See MOREAU, *supra* note 26, at 278–83 (describing the efforts of the NAACP and activists in larger cities like New York and Detroit to remove white-centric textbooks from classrooms and replace them with more diverse and inclusive texts).

literature like Margaret Mitchel's *Gone with the Wind* had taken a prominent place romanticizing the Lost Cause in American culture.⁴⁶ Following the *Brown v. Board of Education*⁴⁷ decision, activists had more comprehensive reforms in mind to advance the school desegregation project. Their efforts led schoolboards to ask that publishers present a more comprehensive account of the role of Black Americans in the nation's founding, economic growth, and the expansion of political rights and power.⁴⁸ The work to integrate history was difficult; publishers and politicians were intent on painting American history as a linear trajectory toward greater inclusiveness and freedom.⁴⁹ White Americans were uncomfortable with problematizing the nation's slaveholding founders, complicating their status as unyielding heroes of liberty and equality. Nonetheless, desegregation provided advocates a powerful basis for arguing that textbooks which failed to integrate American stories, and largely omitted non-white stories aside from harmful stereotypes, failed to provide students with a meaningful education in the spirit of the Court's ruling.⁵⁰

Even these tremendous efforts were largely carried out on a municipal basis. And, they depended on popular will. A decade after *Brown*, the *Wall Street Journal* exposed a practice in publishing where un-integrated and integrated editions of schoolbooks were created for different markets.⁵¹ This led a number of politicians and activists to call for reform of textbooks on a

⁴⁶ See JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 138 (Touchstone ed. 2007) (1995) (discussing the depiction of slavery in mid-twentieth century textbooks as a positive); see also Carrie Hagen, *How Gone with the Wind Took the Nation by Storm by Catering to Its Southern Sensibilities*, SMITHSONIAN (Dec. 15, 2014), <https://www.smithsonianmag.com/arts-culture/how-gone-wind-took-nation-storm-feeding-its-southern-sensibilities-180953617/> (describing the popularity of Mitchell's novel, and the subsequent film, and its romanticizing of the Antebellum South).

⁴⁷ 347 U.S. 483 (1954).

⁴⁸ See MOREAU, *supra* note 26, at 290–91 (noting that activist work in California led the state to publish a report about Black representation in textbooks, and the state subsequently asked publishers to create a new, inclusive textbook).

⁴⁹ It should be noted that opposition to integrated histories came from all corners of the United States. *Id.* at 292–93 (showing resistance to the adoption of more integrated history textbooks in California out of fear that presenting a critical and complex account of American history would weaken patriotism).

⁵⁰ *Id.* at 281–82 (showing the ways that activists fighting for textbook reform mirrored the language of the majority opinion in *Brown* to emphasize the stigmatic harm textbooks had on minority students).

⁵¹ See *Id.* at 307 (noting that publishers created multiple versions of textbooks to satisfy officials in different states) (quoting A. Kent MacDougall, *Integrated Books: School Texts Stressing Negroes' Role in U.S. Arouse the South's Ire*, WALL STREET J., Mar. 24, 1964).

national basis.⁵² Overall, mainstream textbooks taught children the “unreal” lesson that America was a country where only white people contributed:

[W]e must understand that black people have been made Orwellian non-persons in the symbolic world projected by textbook writers. In most textbooks now in use [a Eurocentric bias persists] Of equal importance in the negative conditioning of black and white schoolchildren is the glossing over of the extraordinary complexity in the peopling and building America.⁵³

The attention paid to this issue was nonetheless met with strong resistance and entrenched attitudes. Even as activists, teachers, students, and parents made great strides toward integrating textbooks during the Civil Rights Era, problems persisted, including the continued printing of multiple editions of textbooks for different constituencies, districts, and even sections of the United States.⁵⁴ Further, in response to Civil Rights activism, anti-War sentiment, and a fear that patriotism was waning, many states adopted laws that would prohibit textbooks that would contribute to unrest.⁵⁵

II. EVERYTHING IS MORE INFLUENTIAL IN TEXAS (FOR NOW): TEXAS’S POWER IN DETERMINING CURRICULUM AND TEXTBOOK CONTENT

A. *The SBOE Increasingly Functions as a Political Body*

While debates over curriculum have roiled across the United States, Texas’s size and the structure of its education agency have resulted in the state yielding tremendous influence in education standards nationwide. The particular structure of the SBOE makes it particularly vulnerable to lobbying

⁵² See A. Kent MacDougall, *Integrated Books: School Texts Stressing Negroes’ Role in U.S. Arouse the South’s Ire*, WALL STREET J., Mar. 24, 1964 (stating that textbook publishers were “under mounting pressure outside the South to come up with books that...diminish racial barriers”); *Integrating Dick and Jane*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES (Feb. 12, 2018), https://history.house.gov/Blog/2018/February/2_12_photo_dick_and_jane/ (highlighting the work of the House Education and Labor Committee’s ad hoc Subcommittee on De Facto School Segregation in investigating the textbook industry’s depiction of minorities in schoolbooks).

⁵³ Lerone Bennett Jr., *The Negro in Textbooks: Reading, ‘Riting, and Racism*, EBONY, Mar. 1, 1967, at 130, 132.

⁵⁴ See MOREAU, *supra* note 26, at 306–07 (noting that publishers resorted to “dual editions” of textbooks “because they found it impossible to reconcile the preferences of adoption committees in [cities such as] Cleveland and Detroit with those in Texas and Alabama.”).

⁵⁵ *Id.* at 321 (explaining that Arizona’s Board of Education passed a policy declaring that “textbook content ‘shall not interfere with a school’s legal responsibility to teach citizenship and promote patriotism’ and that it ‘shall not include sections or works which contribute to civil disorder’”).

from special interest groups and sensitive to political pressure. The pressures exerted on state textbook adoption agencies by Confederate veterans' groups in the late nineteenth century reverberate today, albeit by other special interest groups.⁵⁶ In most states, local school districts maintain greater autonomy over their curriculum and textbooks, or their education boards are appointed rather than elected.⁵⁷ Breaking with norms set during Reconstruction, the 1949 Texas Legislature moved to make SBOE members elected officials, a move which has politicized Texas education beyond any other state.⁵⁸

As discussed, Texas' post-Civil War constitution provides that each student be given access to a free education; along with it, the state education code allocates a portion of the state education fund for textbooks.⁵⁹ The SBOE is responsible for managing this fund, and is chartered with designing the standards for K–12 Curriculum (TEKS) according to Texas Education Code § 28.002.⁶⁰ The SBOE represents the interests of 5.3 million students in total.⁶¹ Its members are elected for four-year terms and typically run as

⁵⁶ See THE REVISIONARIES (Kino Lorber 2012), at 26:28 (“One thing that you should understand about the State Board of Education is that every single time the board takes a break, a board member is surrounded by people lobbying from both sides of this issue.”).

⁵⁷ See Hunter Railey, *State Education Governance Structures: 2017 Update*, EDUC. COMM’N OF THE STATES 1, 3–4 (Aug. 7, 2017), <https://www.ecs.org/state-education-governance-structures-2017-update/> (explaining four different state governance structures, three of which provide for boards of education to be appointed rather than elected by voters).

⁵⁸ See Jeremy A. Stern & Sheldon M. Stern, *The State of State U.S. History Standards 2011*, FORDHAM INST. (Feb. 16, 2011), <https://fordhaminstitute.org/national/research/state-state-us-history-standards-2011> (“[B]oth in public hearings and press interviews, the leaders of the State Board of Education made no secret of their evangelical Christian-right agenda, promising to inculcate biblical principles, patriotic values, and American exceptionalism. And politics do figure heavily in the resulting TEKS.”) (follow “Texas” hyperlink).

⁵⁹ TEX. EDUC. CODE ANN. § 31.001 (West 2017) (“Instructional materials selected for use in the public schools shall be furnished without cost to the students attending those schools. Except as provided by Section 31.104(d), a school district may not charge a student for instructional material or technological equipment purchased by the district with the district’s technology and instructional materials allotment.”).

⁶⁰ TEX. EDUC. CODE ANN. § 28.002(c) (West 1995) (“The State Board of Education, with the direct participation of educators, parents, business and industry representatives, and employers shall by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials under Chapter 31 and addressed on the assessment instruments required under Subchapter B, Chapter 39. As a condition of accreditation, the board shall require each district to provide instruction in the essential knowledge and skills at appropriate grade levels . . .”).

⁶¹ Aamena Ahmed, *Report: Public School Enrollment Tops 5 Million in Texas*, TEX. TRIB. (Apr. 1, 2014, 4:00 PM), <https://www.texastribune.org/2014/04/01/report-texas-public-schools-enrollment->

Democrats or Republicans.⁶² Before 2011, school districts were required to use textbooks that had been approved by the SBOE based on their alignment with TEKS curricular standards.

The approval process is two-fold: first, the SBOE convenes to promulgate new educational standards in various academic disciplines. Second, once the standards are adopted, the SBOE makes a call to textbook publishers to draft compliant textbooks. During the curriculum review process, committees—comprised of educators, parents, business and industry representatives, and employers—are nominated by the SBOE and meet to draft the TEKS standards in each subject area under review.⁶³ These drafts are then reviewed by selected experts, who report their findings and recommendations to the SBOE before an adoption vote.⁶⁴

When the committees have completed their drafting, the full SBOE meets to adopt the final TEKS standard, subject to testimony from experts and members of the public.⁶⁵ Texas law gives the SBOE members discretion to amend the TEKS standards presented by each committee.⁶⁶ Once the SBOE adopts a final TEKS resolution, a proclamation is issued to publishers asking them to produce textbooks that comply with the new standards.⁶⁷ The publishers have a year to submit bids with the Texas Education Agency. Subsequently, the SBOE reviews submitted bids and selects textbooks that meet the TEKS standards for adoption.⁶⁸

soars/ (noting that “student enrollment in Texas public schools” has “surpass[ed] the 5 million mark . . .”).

⁶² *State Board of Education: SBOE Members*, TEX. EDUC. AGENCY, https://tea.texas.gov/About_TEA/Leadership/State_Board_of_Education/SBOE_Board_Members/SBOE_Members (last visited Feb. 5, 2020) (providing a list of current SBOE members and the districts that each member represents).

⁶³ *TEKS Review and Revision*, TEX. EDUC. AGENCY, https://tea.texas.gov/Academics/Curriculum_Standards/TEKS_Texas_Essential_Knowledge_and_Skills_%28TEKS%29_Review/TEKS_Review_and_Revision (last visited Feb. 5, 2020) (explaining the process by which the SBOE drafts and reviews TEKS standards for each subject of the required curriculum).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

B. Because the SBOE Members are Democratically Elected Officials, They are Particularly Vulnerable to Lobbying Efforts

In addition to scrutiny from the SBOE, the proposed standards are also open for notice and comment to the general population of Texas. Perhaps no citizens have been more influential in reshaping curricular and textbook standards in Texas through the notice and comment process than Mel and Norma Gabler.⁶⁹ They devoted an enormous amount of their time to lobbying the SBOE, beginning when they looked through their son's high school history textbook.⁷⁰ The Gablers, who were considered highly influential in textbook adoption,⁷¹ believed that history was critical to shaping the ideology of a nation.⁷² They exemplified a still-persistent culture that is deeply distrustful of academia and institutional expertise.⁷³ Their formalistic understanding of the discipline led them to believe that a proper history education, one that was "true," necessarily emphasized facts—not themes and research, which evolve over time.⁷⁴ Importantly, they hued to a belief

⁶⁹ The Gablers undoubtedly left a mark on Texas education, and had an outsized influence on publishers and board members alike. See *Our Mission*, EDUC. RESEARCH ANALYSTS, <http://www.textbookreviews.org/index.html?content=about.htm> (last visited Feb. 5, 2020) (displaying the Gablers' Mission Statement for their think tank, Educational Research Analysts); Block, *infra* note 71; see also Gene Preuss, "As Texas Goes, So Goes the Nation": *Conservatism and Culture Wars in the Lone Star State*, in *POLITICS AND THE HISTORY CURRICULUM* 31 (Keith A. Erikson, ed., 2012) (arguing the Lynn Cheney mimicked the tactics of the Gablers in her national attacks on education in the 1990s).

⁷⁰ William Martin, *The Guardians Who Slumbereth Not*, TEX. MONTHLY, November 1982.

⁷¹ See, e.g., Melissa Block, *Textbook Watchdog Norma Gabler Dies*, NPR (August 1, 2007), <https://www.npr.org/templates/transcript/transcript.php?storyId=12430127> ("Texas began fining publishers hundreds of thousands of dollars for mistakes the Gablers found. Publishers got the message and agreed to insert language the Gablers wanted."); Douglas Martin, *Norma Gabler, Leader of Crusade on Textbooks, Dies at 84*, N.Y. TIMES, Aug. 1, 2007, at B8 ("Publishers, with much to lose if Texas rejected their books, were often willing to make changes to please the Gablers.").

⁷² Martin, *supra* note 70 ("The Gablers seem to believe not only that the proper subject of history is facts rather than concepts but also that [history] . . . should be taught as . . . in older textbooks . . . with a tone that is 'fair, objective and patriotic.'").

⁷³ See Don L. McLeroy, *quoted in* THE REVISIONARIES, *supra* note 56, at 33:57 ("someone has got to stand up to [the experts]").

⁷⁴ See Martin, *supra* note 70 ("Norma and Mel Gabler entered the field of textbook reform . . . after their son returned home from school disturbed at discrepancies between the 1954 American history textbook his eleventh-grade class was using and what his parents had taught him. The Gablers compared his text to history books printed in 1885 and 1921 and discovered differences. 'Where do you go to get the truth?' Jim asked.").

that older textbooks were more factual⁷⁵ and were especially concerned with mitigating the impact of what they viewed as “unpatriotic” American history.⁷⁶ Particularly against the backdrop of Civil Rights’ Era efforts to promote more racially inclusive curricula, this view was pernicious and was replicated by other interest groups: “Well into the 1980s the Texas Society of the Daughters of the American Revolution objected to discussions of Jim Crow, lynching, segregated schools, and race-based restrictions on voting, on the grounds that they would leave students with negative impressions of their country.”⁷⁷

The inclusion of less “traditional” historical actors, the Gablers believed, undermines even the most exemplary student’s sense of national pride and is a product of the pervasive influence of secular humanism and multiculturalism.⁷⁸ This understanding fails to take into account that historians, like all people, have ideologies and experiences that can come to bear on their work and their conclusions must be rigorously examined under this framework. Further, it promotes a reliance on historical thought that scholars today now recognize as incorrect and premised on racist beliefs.

This may seem to highlight a political defect, one that arguably should be dealt with through the democratic process. But leaving curriculum in the hands of politically elected officials with no academic training—who are vulnerable to lobbying efforts and who can procedurally override the proposed curriculum created for the citizens of Texas by actual experts—presents significant barriers to education access. This is particularly so where lobbying efforts are premised on an understanding of history arising out of neo-Confederate, post-Reconstruction understandings.

C. 2010 TEKS Adoption Process and Approval of Textbooks

Against this backdrop, the 2010 TEKS standard review was followed closely by educators, politicians, journalists, and comedians around the

⁷⁵ *Id.*; see also Charmichael, *supra* note 20 (arguing that modern proponents of Confederate heritage view history in a Victorian way, and thus, find post-war accounts written in hindsight by former Confederates rather than primary source documents particularly appealing artifacts).

⁷⁶ See Martin, *supra* note 70 (discussing the fact that the Gablers thought labeling America as a nation of immigrants was unpatriotic).

⁷⁷ MOREAU, *supra* note 26, at 321.

⁷⁸ Martin, *supra* note 70.

world.⁷⁹ That year, the SBOE promulgated new standards for social studies, economics, and math curriculum under TEKS. The rancorous debate surrounding the final curricular standards adopted, and the years of outrage that followed, set off a national debate about ideology in public school classrooms and historiography. Even if the conception that Texas has an outsized influence on the national textbook market is overly simplistic,⁸⁰ Texas's politicization of education and its choice to give the discretion of fifteen politicians legislative authority begs closer scrutiny.⁸¹

The TEKS committee was comprised of nine members (eight who were educators) who had been selected by the SBOE. Committee rules required that all nine members reach consensus on a particular curricular modification in order to adopt it into their draft.⁸² Several of the committee members later spoke out against the adoption process, particularly criticizing the consensus process which allowed one stand-alone member of the committee, who was determined to amplify “jingoism and American exceptionalism” to exert a disproportionate amount of influence on the curriculum draft.⁸³ Next, experts were given the opportunity to review the

⁷⁹ See, e.g., Colbert Report, *Is On Edjukashun: Texas School Board*, COMEDY CENT. (Mar. 16, 2010), <http://www.cc.com/video-clips/wuyjzf/the-colbert-report-is-on-edjukashun---texas-school-board>; Katherine Mangan, *Ignoring Experts' Pleas, Texas School Board Approves Controversial Curriculum Standards*, CHRON. HIGHER EDUC. (May 23, 2010), <https://www.chronicle.com/article/Texas-School-Board-Approves/65661> (showing journalists following the standard review); Chris McGreal, *Texas Schools Board Rewrites US History with Lessons Promoting God and Guns*, GUARDIAN (May 16, 2010), <https://www.theguardian.com/world/2010/may/16/texas-schools-rewrites-us-history>; Valerie Strauss, *Proposed Texas Textbooks are Inaccurate, Biased, and Politicized, new Report Finds*, WASH. POST (Sept. 12, 2014, 4:44 PM), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/09/12/proposed-texas-textbooks-are-inaccurate-biased-and-politicized-new-report-finds/>.

⁸⁰ See, e.g., Brian Thevenot, *The Textbook Myth*, TEX. TRIB. (Mar 26, 2010), <https://www.texastribune.org/2010/03/26/texas-textbooks-national-influence-is-a-myth/> (arguing that Texas's perceived influence on the national textbook market is overemphasized, and that digital classroom materials will obliterate any remaining influence).

⁸¹ See generally Keith Erikson, *Culture War Circus: How Politics and the Media Left Education Behind*, in *POLITICS AND THE HISTORY CURRICULUM: THE STRUGGLE OVER STANDARDS IN TEXAS AND THE NATION* (2012) (“[A]ll power to design the education standards and standardized tests rests in the hands of the 15 board members . . .”).

⁸² See Laura Munoz & Julio Noboa, *Hijacks and Hijinx on the US History Review Committee*, in Erikson, *supra* note 81 (explaining that the Texas Education Agency rules required unanimity in drafting the curriculum, which led to a negotiation between eight members of the committee and one ideologically conservative holdout.)

⁸³ *Id.*

curriculum draft.⁸⁴ These experts included university professors, but also leaders of special interest groups focused on including conservative and religious viewpoints in school curriculum.⁸⁵ After receiving the proposed standard and review from experts, the SBOE exercised its procedural right to amend in each curricular area.⁸⁶

The SBOE offered 300 amendments for the history curriculum alone.⁸⁷ Along partisan lines, the SBOE adopted revisions referring to capitalism as “free market enterprise”⁸⁸ and the Atlantic Slave Trade as the “Atlantic Triangular Trade.”⁸⁹ Students were expected to compare and contrast the inauguration speeches of Jefferson Davis and Abraham Lincoln.⁹⁰ Without

⁸⁴ The experts convened to review the TEKS standards were David Barton, Jesus Francisco de la Teja, Daniel L. Dreisbach, Lybeth Hodges, Jim Kracht, and Peter Marshall.

⁸⁵ See Brian Thevenot, *Hijacking History*, TEXAS TRIB. (Jan. 12, 2010), <https://www.texastribune.org/2010/01/12/sboe-conservatives-rewrite-american-history-books/> (describing the conservative religious leaders appointed as “experts” on history, including Ken Mercer who “takes a coldly mathematical view on historical advances in minority rights”); *Id.* (quoting Ken Mercer as saying: “[m]ultiple locations in the TEKS (standards) even suggest that it is people from ‘racial, ethnic, and religious groups who ‘expand political rights in American society.’ This is an absolutely false premise . . . Only majorities can expand political rights in America’s constitutional society.”). Another expert appointed by the panel, David Barton, founded WallBuilders, “an organization dedicated to presenting America’s forgotten history and heroes, with an emphasis on the moral, religious, and constitutional foundation on which America was built—a foundation which, in recent years, has been seriously attacked and undermined.” *About Us*, WALLBUILDERS, <https://wallbuilders.com/about-us/> (last visited Feb. 5, 2020).

⁸⁶ The amendment process occurs after the public Notice and Comment period. See TEX. EDUC. AGENCY, *supra* note 63. (“A member wishing to amend the proposed TEKS being considered for second reading and final amendment must submit the amendment in writing to staff no later than 5:00 p.m. on the day prior to consideration of the TEKS for second reading and final amendment. All proposed amendments shall be made available to the public to the extent possible.”)

⁸⁷ See Munoz, *supra* note 82 (showing that the Board “distorted” the work of the committee so much that six of the nine members of the committee released a public letter decrying “as public . . . [their] collective disgust . . . at the distorted culmination of [their] work”).

⁸⁸ 19 TEX. ADMIN. CODE § 113(B) (2010), available at <http://ritter.tea.state.tx.us/rules/tac/chapter113/ch113b.html>.

⁸⁹ *Id.* The language proposed to describe the slave trade received a good deal of national attention, and ultimately the board changed the language to “transatlantic slave trade.” See, e.g., Amanda Paulson, *Texas Textbook War: ‘Slavery’ or ‘Atlantic Triangular Trade’?*, CHRISTIAN SCI. MONITOR (May 19, 2010), <https://www.csmonitor.com/USA/Education/2010/0519/Texas-textbook-war-Slavery-or-Atlantic-triangular-trade>; Laura Moser, *Texas is Debuting Textbooks that Downplay Jim Crow and Frame Slavery as a Side Issue in the Civil War*, SLATE (July 7, 2015, 12:26 PM), <https://slate.com/human-interest/2015/07/texas-textbook-revisionism-new-textbooks-in-the-lone-star-state-downplay-role-of-slavery-in-civil-war.html>.

⁹⁰ 19 TEX. ADMIN. CODE § 113(B) (2010), available at <http://ritter.tea.state.tx.us/rules/tac/chapter113/ch113b.html>.

more context, this is disingenuous because Davis's speech makes no mention of slavery. Without more, students may never discuss the subtext of Davis's emphasis on property rights (in human persons), or the righteousness of the Confederate cause. Slavery is listed as one among many causes of the Civil War, with no particular emphasis placed on its now-recognized central role in the conflict.⁹¹ No expansion or discussion of the lives of freedmen was adopted in the Reconstruction curriculum, except to "compare the effects of political, economic, and social factors on slaves and free blacks."⁹² This language implicitly takes agency away from enslaved people and freedmen, and dangerously underemphasizes their role in shaping American history. The standards make no mention of the immense economic benefits slavery garnered the United States, Black Codes, the rise of the Ku Klux Klan, Jim Crow laws, or the terrorism of lynching and other policies in the wake of Reconstruction. The only mention of segregation in the standards is a passing mention of "desegregation of the armed forces."⁹³ An amendment by one member of the SBOE, to ask students to "explain instances of institutional racism," failed.⁹⁴ Nothing in the standard asks students to be able to draw connections to injustice or progress today.

The SBOE operated along factional lines, with some members publicly discussing their political motivations for sponsoring particular amendments

⁹¹ During the adoption process, Board Member Pat Hardy suggested that slavery was ancillary cause of the Civil War. Ultimately, the Board adopted a standard that listed slavery as the third cause of the war, alongside tariffs, states' rights, and sectionalism. Observers argued that this had the consequence of diminishing slavery's role as the central cause of the war. See *The Diane Rehm Show: Texas Textbooks and Teaching the Civil War and America's History of Racial Segregation*, WAMU 88.5 (July 8, 2015) (quoting Emma Brown as saying: "Right, well . . . my feeling from watching the debate was the Board stood by Pat Hardy's comment that slavery was a side issue, and so this should be listed third."); see also Brian Thevenot, *TribBlog: History Paige*, TEX. TRIB. (May 19, 2010, 10:00 AM), <https://www.texastribune.org/2010/05/19/rod-paige-address-state-board-of-education/>; Emma Brown, *Texas Officials: Schools Should Teach that Slavery was 'Side Issue' to Civil War*, WASH. POST (July 5, 2015), https://www.washingtonpost.com/local/education/150-years-later-schools-are-still-a-battlefield-for-interpreting-civil-war/2015/07/05/e8fbd57e-2001-11e5-bf41-c23f5d3face1_story.html?postshare=1131436146849871.

⁹² 19 TEX. ADMIN. CODE § 113.18(b)(7)(B) (2010), available at <http://ritter.tea.state.tx.us/rules/tac/chapter113/ch113b.html>.

⁹³ 19 TEX. ADMIN. CODE § 113.41(c)(9) (2010), available at <http://ritter.tea.state.tx.us/rules/tac/chapter113/ch113b.html>.

⁹⁴ THE REVISIONARIES, *supra* note 56, at 1:07:40 ("explain instances of institutional racism . . . the amendment fails").

without mention of any academic basis.⁹⁵ The point was to provide a political “balance” to the teaching of history.⁹⁶ Critics found the TEKS standard “obtrusive,” and reliant on the brute memorization of a laundry list of examples that are intellectually incoherent and pedagogically impossible to administer.⁹⁷ Those who closely followed the standard setting process argued that the emphasis on requiring students to memorize lists of names and events disserves students in two ways. First, it deemphasized the importance of critical inquiry and debate. Second, from a procedural standpoint, it allowed the SBOE to claim “balance” when it was accused of promoting an ideological agenda by pointing to various women and minority figures it had included in the standard. Such was the outrage that the 2011 State Legislature adopted a law that allowed school districts to procure textbooks not on the approved list for the first time ever.⁹⁸ Even still, the consequences of the standards in the classroom mean that teachers are required by law to comport with the standards regardless of what the textbooks say.

⁹⁵ James C. McKinley Jr., *Texas Conservatives Win Curriculum Change*, N.Y. TIMES (March 12, 2010), <https://www.nytimes.com/2010/03/13/education/13texas.html> (“Dr. McLeroy . . . made sure that textbooks would mention the votes in Congress on civil rights legislation, which Republicans supported. ‘Republicans need a little credit for that,’ he said. ‘I think it’s going to surprise some students.’”)

⁹⁶ Jesus de la Teja, *A Voice Crying in the Wilderness: An Expert Reviewer’s Experience*, in POLITICS AND THE HISTORY CURRICULUM, *supra* note 81 (“For instance, some board members had expressed concern that America’s history tended to be presented negatively by “revisionist” historians, and this was reflected in asking the writing teams to “ensure the TEKS include an accurate representation of history and reflect a balanced perspective of both positive and negative.”); Texas Education Agency, *Guidelines for Expert Feedback on the Social Studies TESK*, reprinted in *id.* (Do the TEKS ensure that social studies concepts are presented in an accurate and factual manner? Do the standards promote ideological neutrality by balancing people/events from various sides of the political spectrum?”)

⁹⁷ See generally EDWARD COUNTRYMAN, TEX. FREEDOM NETWORK EDUC. FUND, COMPLYING WITH, GETTING AROUND, AND BYPASSING THE TEKS HISTORY STANDARDS 4 (Sept. 2014) (positing that the TEKS history standards emphasize “brute memorization”); Stern & Stern, *supra* note 58 (“While such social studies doctrine is usually associated with the relativist and diversity-obsessed educational left, the right-dominated Texas Board of Education made no effort to replace traditional social studies dogma with substantive historical content. . . . [T]he document distorts or suppresses less triumphal or more nuanced aspects of our past that the Board found politically unacceptable (slavery and segregation are all but ignored, while religious influences are grossly exaggerated). The resulting fusion is a confusing, unteachable hodgepodge, blending the worst of two educational dogmas.”)

⁹⁸ TEX. EDUC. CODE § 31.101(b). For a longer discussion of this change, see Part V, *infra*.

In 2013, the SBOE issued a proclamation to textbook publishers for new materials to comply with the TEKS standards.⁹⁹ Ultimately, twenty-three instructional materials (including digital content and textbooks) were adopted for middle and high school United States history courses.¹⁰⁰ In some instances, the textbooks handle the cumbersome TEKS standards well, and with nuance.¹⁰¹ Others downplay slavery as the central cause of the Civil War:

Southerners used states' rights to justify secession. . . . They believed the national government had broken the contract by refusing to enforce the Fugitive Slave Act and by denying Southern states equal rights in the territories. As a result, Southerners argued, the states had a right to leave the Union.¹⁰²

This passage suggests that states' rights were the primary impetus for secession, not the institution of slavery, even as the founding documents of the Confederacy relied explicitly on slavery to secede and, as has been discussed, the states' rights justification first appeared *after* the Civil War ended.¹⁰³ Other critics have pointed out that some texts use the passive voice to describe the actions of plantation owners, effectively distancing them from the violent acts they committed.¹⁰⁴ Ultimately, many of the texts are

⁹⁹ TEX. STATE BD. OF EDUC, PROCLAMATION 2015 (2013), *available at* https://tea.texas.gov/sites/default/files/Proclamation2015_010914.pdf.

¹⁰⁰ TEX. STATE BD. OF EDUC, PROCLAMATION 2015 ADOPTED INSTRUCTION MATERIALS (2015), *available at* <https://tea.texas.gov/sites/default/files/Proclamation2015%20Adoption%20Instructional%20Materials.pdf>.

¹⁰¹ See COUNTRYMAN, *supra* note 97, at 13. *Pearson's US History: Colonization through Reconstruction*, for instance, was found to "laudably" handle the issue of comparing the speeches of Lincoln and Davis, because, "[g]iven that the main thrust of the TEKS requirement on comparing these speeches seems to have been a neo-Confederate attempt to displace slavery as the primary problem behind the Civil War," the student is asked to analyze and reflect upon excerpts of each speech. The textbook asks: "Davis did not directly mention slavery in his inaugural address, while Lincoln said he would not interfere with slavery in the states where it already existed. Why do you think neither man explicitly made pro- or anti-slavery arguments in his speech?" *Id.* "Although Reconstruction had long-lasting achievements, it did not succeed in protecting African Americans' rights. Even while federal troops remained in the South, groups such as the underground Ku Klux Klan harassed and terrorized people to maintain white power and privilege." *Id.* at 24.

¹⁰² Countryman, *supra* note 97, at 15.

¹⁰³ See *supra* Part I.

¹⁰⁴ See Ellen Bresler Rockmore, Opinion, *A Texas History Lesson*, N.Y. TIMES (Oct. 21, 2015), <https://www.nytimes.com/2015/10/22/opinion/how-texas-teaches-history.html> ("Some slaves reported that their masters treated them kindly. To protect their investment, some slaveholders provided adequate food and clothing for their slaves. However, severe treatment was very common. Whippings, brandings, and even worse torture were all part of American slavery." (quoting a Houghton Mifflin Harcourt textbook)).

hindered by the TEKS emphasis on rote memorization. This, critics argue, leads to an emphasis on reciting a litany of events and political actors and diminishes examining the experiences of traditionally marginalized people.¹⁰⁵

III. RETHINKING GOVERNMENT SPEECH: TEKS STANDARDS, ERASURE, AND THE EQUAL PROTECTION CLAUSE

Criticisms of Texas's education standards rest on their relative weakness as pedagogical instruments, in subjects ranging from biology to history. Education scholars and political scientists have decried cronyism in the textbook selection process. Indeed, some litigants have brought actions in federal court to enjoin the state from blocking certain textbooks from the approval process, and lawmakers have in turn sought to insulate teachers from judicial scrutiny over these issues.¹⁰⁶ Much of the legal outcry centers on the collision of the Establishment Clause and the practice of teaching creationism in public schools. Thus far, however, little attention in legal circles has been devoted to racial inequity in curricula, although there are important potential parallels between the Establishment Clause and Fourteenth Amendment's Equal Protection Clause.¹⁰⁷

The particular process the SBOE followed in promulgating curricular standards in 2010, the resulting curricular materials, and the impact on public school students' ability to grapple with American history and race deserve further scrutiny. The TEKS curricular choices, at least implicitly, were premised on historiography that has been largely debunked and was written by scholars who were intent on promoting white supremacy.¹⁰⁸ This Part begins by briefly discussing why the political branches are unsuitable for drafting stable solutions to this issue. Then, it discusses why the Equal

¹⁰⁵ Countryman, *supra* note 97, at 20 ("[Houghton Mifflin Harcourt] does a does a lackluster job of helping students explore the quotidian experiences and perspectives of those not directly involved in political debates.") (brackets in original).

¹⁰⁶ See *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005) (finding that curricular speech is free speech).

¹⁰⁷ Following the 2010 TEKS adoption, the NAACP and LULAC filed a formal complaint with the Department of Education, but no action was taken by the Department of Justice. Gary Scharrer, *Black Panthers Overemphasized in Texas Schools, NAACP Says*, HOUSTON CHRON. (Dec. 20, 2010), <https://www.chron.com/news/houston-texas/article/black-panthers-overemphasized-in-texas-schools-1698140.php>.

¹⁰⁸ See *supra* Section I.A.

Protection Clause offers a means for litigants to acquire relief. Finally, because there is scant caselaw litigating these issues, it suggests tests that courts could use to analyze the inequity of curricula.

Following the 2010 TEKS adoption process, Texas's legislature and citizenry took steps to blunt the effect of the curriculum and textbook adoption process. Specifically, the state no longer required school districts to purchase textbooks exclusively from the SBOE-approved list.¹⁰⁹ Secondly, voters voiced disapproval with the SBOE, most notably by voting Chairman McLeroy—a controversial and conservative education reform figure¹¹⁰—out of office in a Republican primary in his district.¹¹¹ These changes may suggest that the political process is an appropriate place to remedy educational defects, but relying on the political process as an adequate solution places vulnerable minority groups in a precarious position.¹¹² Furthermore, this ignores the intent of legislators who established universal access to public education as a condition of re-entry into the Union, who sought to insulate education policy from politics.

Recall the fact that the SBOE was not an elected body until the mid-twentieth century.¹¹³ Within this context, the most appropriate political solution would be for the legislature to repeal the 1949 statute making the SBOE democratically elected and revert to a system wherein the SBOE is comprised of appointed officials. This solution, of course, will not entirely remove them from political scrutiny, but it would be a start toward wresting

¹⁰⁹ Lauren McGaughy, *Lone Star Influence on Textbooks Waning Nationwide*, HOUSTON CHRON. (Nov. 27, 2014), <https://www.houstonchronicle.com/news/education/article/Lone-Star-influence-on-text-books-waning-nationwide-5921656.php> (noting how quickly many school districts took advantage of the new legislation).

¹¹⁰ See Abby Rapoport, *SBOE 9: McLeroy Loses Seat to Ratliff*, TEX. TRIB. (Mar. 2, 2010), <https://www.texastribune.org/2010/03/02/sboe-9> (explaining that McLeroy's challenger won on a platform of taking politics out of education).

¹¹¹ See, e.g., Russel Shorto, *How Christian Were the Founders?*, N.Y. TIMES MAG. (Feb. 11, 2010), <https://www.nytimes.com/2010/02/14/magazine/14texbooks-t.html> (describing Chairman McLeroy's amendments to the education curriculum as "a single-handed display of archconservative political strong-arming"); Texas Freedom Network, *TEN President Kathy Miller vs. Don McLeroy*, YOUTUBE (June 22, 2016), https://www.youtube.com/watch?time_continue=36&v=Sk_7-F0dYW0.

¹¹² See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.")

¹¹³ See *supra* Part II.

curricula out of the political sphere. Barring such legislative reform, groups who might be the target of discrimination or subordination would struggle to combat such speech.¹¹⁴

A. Promoting a Neo-Confederate Justification of the Civil War is Impermissible Government Speech

Although a robust body of case law about school censorship and selection of textbooks exists, few challenges to school curricula have been mounted, and even fewer have been successful.¹¹⁵ Much of this has to do with the broad leeway afforded government speech used to enact policy goals.¹¹⁶ Even so, there are constitutional limits to government policy affecting curricula.¹¹⁷ If the TEKS standards are not prohibited by the current limitations, then that limit must be expanded or reframed. With this in mind, it is useful to think of the TEKS standards alongside other state displays of historically racist artifacts and symbols. In this context, where the state promotes a debunked history that was promulgated in order to perpetuate racial oppression, there can be no tenable basis for permitting that speech.¹¹⁸

¹¹⁴ “Of the 4.8 million children attending Texas Public Schools last year, 66% were students of color. Whites make up two-thirds of the SBOE.” Gary Scharrer, *Black Panthers Overemphasized in Texas Schools, NAACP Says*, HOUS. CHRON. (Dec. 20, 2010, 6:30 AM CST), <https://www.chron.com/news/houston-texas/article/Black-Panthers-overemphasized-in-Texas-schools-1698140.php>.

Furthermore, members of the Houston and San Antonio communities had no direct representation on curriculum design committees in the 2010 TEKS process. Stephen Cure, *Negotiating for Quality: Taking a Proactive Approach to Achieve a Positive Outcome*, in Ereksan, *supra* note 81.

¹¹⁵ See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 869 (1982) (“[P]etitioners might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values.”); Griswold v. Driscoll, 616 F.3d 53, 56–57 (1st Cir. 2010) (concluding that Turkish-American students had no constitutional right to challenge the removal of contra-Genocide references in advisory curriculum); Chiras v. Miller, 432 F.3d 606, 620 (5th Cir. 2005) (holding that curriculum decisions and textbook selection does not have to be viewpoint neutral).

¹¹⁶ See *Pico*, 457 U.S. at 853.

¹¹⁷ *Gonzalez v. Douglas* is informative in this regard. 269 F. Supp. 3d 948 (D. Ariz. 2017). After a widely successful Mexican-American Studies course was banned by the Arizona state legislature, the students and teachers of the Tucson School District successfully sued in federal court, with the court holding that the facially-neutral law effectuating the ban was discriminatory. *Id.* at 974. Of course, in that case, the legislature was acting to ban or censor a particular kind of curriculum, whereas here, Texas is not.

¹¹⁸ See James Forman Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitals*, 101 YALE L.J. 505, 506 (1991) (arguing that the Court’s failure to prevent state governments from displaying the confederate flag on state ground chills the free speech rights of racial minorities in the United States).

When the government uses hate speech or speech that supports a hateful viewpoint, this should be barred by the Equal Protection clause, although this may not seem intuitive under the government speech doctrine.¹¹⁹ We tend to think about cognizable Fourteenth Amendment harms arising from what Helen Norton refers to as “hard” as opposed to “soft” law; that is when the government distributes a benefit or a harm in a way that benefits one suspect group over another, rather than where the government speaks.¹²⁰ Thus, litigants must make some showing of discriminatory intent that the court recognizes as a harm.¹²¹ On the other hand, we tend to think of soft law (such as the viewpoint of a single actor or a policy platform¹²²) as curable through political intervention, though there is reason to rethink that position in instances where the government itself uses institutional power and official platforms to express a viewpoint.¹²³ Typically, harms arising out of soft law do not engender the sort of disproportionate discriminatory effect courts will recognize.¹²⁴ Soft harms, however, should be seen along a continuum.

¹¹⁹ Helen Norton, *The Equal Protection Implications of the Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 171–72 (2012); see also Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265 (2019) (arguing that the Supreme Court alternately relies on redemptive and parenthetical modes of understanding race, history, and the need for Equal Protection).

¹²⁰ Norton, *supra* note 119, at 167–68.

¹²¹ See *Palmer v. Thompson*, 403 U.S. 217, 219 (1971) (holding that a town closing its public swimming pools to avoid integration does not constitute a harm); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (“The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.” (quoting *McCray v. United States*, 195 U.S. 27, 56 (1904))); *Daniels v. Harrison Cty. Bd. of Supervisors*, 772 So. 2d 136, 138 (Miss. 1998) (holding that flying the Mississippi Flag on a public beach does not violate any constitutionally conferred rights).

¹²² See Norton, *supra* note 119, at 170 (“Even noxious government speech generally furthers [the marketplace of ideas] by revealing the government’s preferences to the electorate and by adding to the ongoing public discourse.”)

¹²³ See *Civil War at 150: Still Relevant, Still Divisive*, PEW RESEARCH CTR. (Sept. 6, 2019, 9:43 PM), <http://www.people-press.org/2011/04/08/civil-war-at-150-still-relevant-still-divisive> (showing that 48% of Americans believe states’ rights were the cause of the Civil War); *2010 Census Data*, CENSUS BUREAU, U.S. DEP’T COMMERCE, <https://www.census.gov/2010census/data/> (last visited Feb. 5, 2020) (showing that 70% of Texans are white). This shows that if Americans erroneously believe that states’ rights caused the Civil War, they may be unlikely to use the political process to support curricular changes that condemn white supremacy, or may be reluctant to support the removal of confederate monuments on state or municipal property because they fail to recognize them as objects of white supremacy or may agree with that position.

¹²⁴ See generally *Coleman v. Miller*, 117 F.3d 527, 529 (11th Cir. 1997) (requiring that challenges to the incorporation of the Confederate Battle Flag into state flags “must first demonstrate that the flying of the . . . flag produces disproportionate effects along racial lines, and then must prove that racial

While we might not want to enjoin a single government actor for expressing his own viewpoint¹²⁵ (however terrible), causes of action under the Equal Protection Clause should arise where government actors use institutions, platforms, or policies to espouse racist or otherwise discriminatory speech *on the government's behalf*.

In school desegregation jurisprudence, courts examine the racial makeup of the student population in a given school, disparate distribution of punishment, and dropout rates to determine whether a school is in violation of the Fourteenth Amendment.¹²⁶ Pivoting towards an expressive meaning theory of Equal Protection would allow courts to recognize government speech—here, the promotion of neo-Confederate ideology in school curriculum—as violating the Fourteenth Amendment. This policy has discriminatory roots, designed to maintain racial hegemony.¹²⁷

Litigants who have challenged a state's display of historical racism are often barred from suit because their allegations do not show the violation of a legally recognized right.¹²⁸ Stigmatic harm, unaccompanied by a violation of a constitutionally conferred right or intent to discriminate through government action, is often not recognized by the Court.¹²⁹ Appellate court rulings have reflected this notion, holding that courts are inappropriate

discrimination was a substantial or motivating factor behind the enactment of the flag legislation”); *Moore v. Bryant*, 205 F. Supp. 3d 834, 858 (S.D. Miss. 2016), *aff'd*, 853 F.3d 245 (5th Cir. 2017) (holding that the Confederate battle flag cannot be demonstrated as the reason the plaintiff himself fears for his life, rather than other individuals).

¹²⁵ See, e.g., Editorial, *About John Kelly's Racist History Lesson*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/opinion/kelly-racist-history-slavery-compromise.html> (quoting John Kerry as saying: “Robert E. Lee was an honorable man . . . [In the Civil War] men and women of good faith on both sides made their stand where their conscience had them make their stand.”).

¹²⁶ See, e.g., *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 435 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 2 (1971) (“Policy and practice with regard to faculty, staff, transportation, extra-curricular activities, and facilities” are “among the most important indicia of a segregated system”).

¹²⁷ See *supra* Part I.

¹²⁸ See *Moore*, 205 F. Supp. 3d at 853 (holding that “[w]ithout sufficient facts that Moore is treated differently because of [his exposure to the Mississippi flag which contains the Confederate battle flag], his argument that he feels like a second-class citizen does not give rise to a legal injury”); see also *Grimes ex rel. Grimes v. Cebalos*, 832 F. Supp. 704, 708 (S.D.N.Y. 1993), *aff'd*, 37 F.3d 857 (2d Cir. 1994) (showing that courts may recognize a justiciable harm arising out of school curriculum, but only where it was enacted with discriminatory intent).

¹²⁹ See, e.g., *NAACP v. Hunt*, 891 F.2d 1555, 1562 (11th Cir. 1990) (holding that because all citizens were exposed to the Confederate Battle Flag at the state capital, Alabama’s decision to fly the flag did not have a discriminatory effect on Black citizens).

places to referee disputes arising out of “social sensitivity.”¹³⁰ This seems misguided at best in the state flag context and pernicious when applied to school curricula which may have disparate impacts on the abilities of students of all racial groups to perform and learn effectively.

Within this framework, TEKS standard proceedings present a unique opportunity to litigants: the SBOE directly sets policy through a quasi-legislative process and openly endorsed a historical theory of the Civil War predicated on states’ rights, suggesting that the institution of slavery was merely ancillary to the war. Here, therefore, the state has enacted a policy requiring schools to teach one protected class of students their historic enslavement was not the primary cause of the Civil War. This policy is informed by historiography arising out of Confederate veterans’ attempts to justify the Civil War on grounds other than slavery.¹³¹ To require students to learn this account of history, while simultaneously failing to require that students learn about the Jim Crow Era, the Ku Klux Klan, and systemic racism is not only fallacious, it has real harms that deprive all students of their rights of equal access to education free from racial discrimination.¹³² Systemic erasure of history in the classroom is harmful because it excludes critical actors, narratives, and voices from the classroom. This curriculum, enacted to “promote patriotism” among Texas children,¹³³ operates on a debunked (or at minimum, highly distorted) account of American history and marginalizes and erases the experience of non-white Americans. If there are

¹³⁰ *Id.* at 1565.

¹³¹ *See supra* Part I.

¹³² *See* Erin B. Godfrey et al., *For Better or Worse? System-Justifying Beliefs in Sixth-Grade Predict Trajectories of Self-Esteem and Behavior Across Early Adolescence*, 90 CHILD DEV. 180, 190 (2019) (showing that, among marginalized sixth grade students, system-justifying beliefs are associated with better outcomes in sixth grade but worsening trajectories of these outcomes over the course of middle school); *Teaching Hard History: American Slavery*, TEACHING TOLERANCE, S. POVERTY LAW CTR., <https://www.tolerance.org/frameworks/teaching-hard-history/american-slavery> (last visited Feb. 5, 2020) (showing the tangible impact that inadequate curriculum has on students’ understandings of American race history). Beyond curriculum, the textbooks that students must read fail to adequately center slavery as the primary cause of the Civil War, and some even depict slavery with a rosy valance. *See* Bobby Finger, *Here’s How New Texas Public School Textbooks Write About Slavery*, JEZEBEL (Sept. 1, 2015), <https://jezebel.com/heres-how-new-texas-public-school-textbooks-write-about-1726786557> (arguing that in addition to overemphasizing “positive” aspects of slavery, the textbooks downplay the racially-motivated terror inflicted on Black people by the Ku Klux Klan, and the state-sanctioned violence of the Jim Crow era).

¹³³ *See supra* Part I.

limits to government speech, surely ignoring historical realities to promote a racist viewpoint must be impermissible.

The Southern Poverty Law Center's recent study on teaching slavery in American public schools suggests this problem is dire: only 8% of high school seniors who participated in their survey were able to identify slavery as the cause of the Civil War.¹³⁴ Beyond that, only 22% of students were able to identify the ways in which the Founding documents protected the institution.¹³⁵ Fewer than 40% were able to make connections between slavery's growth and the profound impact it had on shaping understandings about race and white supremacy, not just in the South but in the entire United States.¹³⁶ By choosing to impart patriotic narratives over requiring students to consider nuance, in choosing to teach history that is widely accepted as wrong today, Texas (and much of the United States, to some degree) is failing its students.

To help illustrate my point: imagine if a government (legislative body, school council, or Mayor's office, for example) enacted school policy that explicitly promoted white supremacy. This would, of course, be impermissible—the government surely cannot openly promote one race and denigrate another.¹³⁷ This would clearly defy the Court's standard of review for race-based qualifications discussed above. The central point is that the TEKS standard is not so different from this hypothetical. Although the Texas government may not be explicitly condoning white supremacy, it nonetheless relies on a white supremacist account of history to create its education standards, and thus, it may operate to tell its students that racist accounts of history are correct. Not only does this harm students for all of the reasons discussed above, it also fails to pass muster under the current standard of review: such accounts of history do not comport with our current understanding of race-based classifications.

¹³⁴ S. POVERTY LAW CTR., *supra* note 132.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See Anderson v. Martin*, 375 U.S. 399, 402 (1964) (invalidating a law which placed a candidate's race on the ballot next to his or her name because "by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important . . . consideration in the citizen's choice").

B. Establishment Clause Caselaw Provides a Helpful Basis Point for Developing a Framework to Scrutinize Curricular Standards

While little caselaw deals directly with the intersection of government speech and race in the curriculum context, Establishment Clause jurisprudence may offer helpful signposts. Our Constitution tells us that the government may not make any law respecting a particular religion.¹³⁸ At its most basic level this prevents the government from promoting one religion at the expense of another, or from denigrating a particular religion. As Professor Laurence Tribe elucidates:

Even though there ought to be *no* messages that private individuals are forbidden to utter, there *are* certain messages which the *government* should be forbidden to propagate. The most strongly rooted basis for distinguishing between private and government messages in this way appears to be the First Amendment's Religion Clauses.¹³⁹

The Court has developed robust constraints out of the Establishment Clause, including the three-part test handed down in *Lemon v. Kurtzman*.¹⁴⁰ In *Lemon*, the Court held that a statute being evaluated under the Establishment Clause must: (1) have a secular legislative purpose; (2) not advance nor inhibit religion; and (3) must not result in an "excessive government entanglement" with religion.¹⁴¹ The disjunctive test invalidated funding schemes in states that benefitted parochial schools with religious missions. Indeed, even in the Establishment Clause context, the Court has treated the use of religious iconography in classrooms more stringently than in other governmental contexts.¹⁴² This suggests that public school students are more particularly vulnerable to government overreach than citizens might be in other contexts.

Similar tests could be developed in the Equal Protection Clause context by springboarding off of the Fourteenth Amendment's prohibition on

¹³⁸ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

¹³⁹ Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 29 n.72 (1993).

¹⁴⁰ 403 U.S. 602 (1971). For another use of the *Lemon* test, see *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *vacated sub nom.* *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (mem.).

¹⁴¹ *Id.* at 612–13.

¹⁴² See *Stone v. Graham*, 449 U.S. 39, 39–40 (1980) (prohibiting display of the Ten Commandments in public school classrooms). But see *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (holding that the display of a monument to the Ten Commandments on Texas State House grounds was permissible under the *Lemon* test).

government policy that denotes racial inferiority.¹⁴³ A more expansive understanding of this central holding from *Brown v. Board of Education*, combined with the analytical framework at work in *Lemon*, could be used to invalidate the TEKS standards at issue here. Given the Court's recent emphasis on anti-classification, the *Lemon* test offers particular appeal. A similar test might allow courts to determine whether a government policy is too entangled with historical racial stratification to be legitimate.

This test would be particularly useful in school contexts, where the Court has explicitly distinguished that the government's promotion of religion is not "passive" and not justified by historical context.¹⁴⁴ Similar arguments can be raised against the government's promotion of particular racial narratives in education. In this case, the severe de-emphasis on the impact of slavery on the Civil War, or the lack of discussion of Jim Crow regimes certainly implies that *this* American history is less significant. If *Brown* does stand for the proposition that segregation is impermissible because of the message it sends, we must ask ourselves what message does the TEKS curriculum send? That slavery didn't really matter in the Civil War? That Jim Crow was not critically important to our understanding of race? Requiring a government to demonstrate that a challenged law does not impermissibly convey a message of racial superiority seems to be a reasonable first step in combatting problematic curriculum.

CONCLUSION

Americans wrestle with the meaning of the Civil War today; the foundation for this debate was laid in the Reconstruction Era. Some might suggest that challenging the adoption of TEKS on the grounds that it promoted a neo-Confederate viewpoint for the origins of the Civil War would be unsuccessful. The state of jurisprudence suggests that courts would be reluctant to scrutinize such content. But curricular standards founded on a racist historiography of the Civil War and Antebellum Period is discriminatory and does not provide an equal educational opportunity to all students. A resurgence of education-related caselaw focused on systemic

¹⁴³ See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954) ("Segregation . . . has a detrimental effect . . . The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.").

¹⁴⁴ *Perry*, 545 U.S. at 691.

disparity in public schools suggests that the time is ripe for a reimagining of the role education plays in preparing students for life as active citizens.